

U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, D.C. 20529-2090



**U.S. Citizenship
and Immigration
Services**

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BS

FILE:

SRC 07 800 21427

Office: TEXAS SERVICE CENTER Date:

MAR 11 2009

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
S John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. At the time he filed the petition, the petitioner was a postdoctoral research fellow at Mississippi State University (MSU). The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel and further documentation.

Section 203(b) of the Act states, in pertinent part:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --

(A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of Job Offer.

(i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service [now U.S. Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the “prospective national benefit” [required of aliens seeking to qualify as “exceptional.”] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien’s past record justifies projections of future benefit to the national interest. The petitioner’s subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term “prospective” is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines “exceptional ability” as “a degree of expertise significantly above that ordinarily encountered” in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

Several letters accompanied the petitioner’s initial submission. Professor Emeritus [REDACTED] was formerly the petitioner’s advisor during the petitioner’s doctoral studies at the University of Wisconsin-Madison. [REDACTED] stated:

[The petitioner’s] dissertation research involves the incorporation of environmental (natural and built) variables into small-area population forecasting models. . . . In many states, as here in Wisconsin, there is state legislation (that generally goes by the rubric “Smart Growth” legislation) that demands of local planners a set of population and

economic forecasts to be carried out in the development of “Smart Growth” comprehensive land use plans. Sadly, such legislation rarely includes any instructions on how these forecasts should be carried out. . . . [The petitioner’s] dissertation is an attempt to fill this gap. . . .

In terms of substantive research expertise, [the petitioner] has established himself [as] a solid spatial demographer. His research achievements are well recognized in the field of spatial demography. . . .

[H]e presently is collaborating with me, [REDACTED] (Oregon State) and [REDACTED] (Loyola University) on a migration project that models county-to-county migration flows.

I would summarize [the petitioner’s] skills and work habits by saying that he exceeds any graduate researcher I have worked with in terms of initiative, self-drive, and intellectual curiosity.

[REDACTED] Chair of the Department of Soil Science at the University of Wisconsin-Madison, stated:

Although several theories have been offered to explain the mechanism of population change, along with numerous empirical studies, much of this vast literature is scattered across several disciplines. . . . [The petitioner] proposed an interdisciplinary approach to integrate different disciplines’ strengths. . . . [The petitioner’s] approach is an effective blend of environmental studies and applied demography. . . .

[The petitioner’s] research also provides a systematic theoretical framework for understanding population change, by offering a holistic, comprehensive, and rational approach to study population change. . . .

Although environmental demography as [a] field is still a new idea, I believe [the petitioner] has the strong potential to effectively promote this new area in social science and become a very successful environmental demographer.

[REDACTED] stated:

I have worked closely with [the petitioner] in the past year, and I am very much interested in continuing my support to and collaboration with him. In fact, I am in the process of considering to promote him to a status of research assistant professor. . . .

I am [the petitioner’s] supervisor at the Social Science Research Center, and I recruited him to my research unit in August 2006. . . .

[The petitioner's] responsibilities in my unit can be divided into two parts – research and data management coordination. I am working with him on several projects, including children's poverty, concentration of poverty, and highway effects of segregation. In the children's poverty project, we are studying how the Earned Income Tax Credit (EITC) and Temporary Assistance for Needy Families (TANF) act as policies to support work especially for rural families in light of economic restructuring. . . . For the concentration of poverty project, we are studying the geographic distribution pattern of single female-headed families with children, and the driving factors of such pattern. The results will inform decision makers on how to better use planning, financial, and legislation resources to help these people. . . . [The petitioner] has initiated a research which studies highway effects on segregation. . . . [No previous researchers] have ever studied the effects of highways on segregation although highway plans an important role in affecting our daily activities.

[REDACTED] stated that the petitioner wrote “*the strongest paper that I have ever read* on the linkage between major highway expansion and population (or employment) growth. It has the most rigorous panel design in the current literature, bar none” (emphasis in original). Prof. [REDACTED] deemed the petitioner “an exceptional social scientist, whose continued participation in his current research is crucial and absolutely irreplaceable.”

[REDACTED] President and CEO of the Educational Policy Institute, Virginia Beach, Virginia, stated:

Although I have never met [the petitioner] personally, I am familiar with his work through his publications and conference presentations. Impressed with his expertise in spatial demography and population forecasting, I asked him to be my consultant for a proposal that my group has been working on. . . .

This is a multidisciplinary research project requiring expertise in various topics including statistics, demographic analysis, children's welfare, population estimation and forecasting, and spatial analysis, which is usually too demanding for an average social scientist. [The petitioner's] familiarity and proficiency in this wide range of subjects makes him a very uniquely capable scholar. He is the inventor of a ground-breaking method for small-area population estimation and forecasting. . . . He is also a pioneer in using spatial statistics and analysis for demographic studies. . . . And he is also known for his continuous earnest and absorption [*sic*] in children's welfare research.

[REDACTED] of the State University of New York at Buffalo credited the petitioner with original and influential work, and praised the petitioner's “contributions and potential” and his broad “expertise in spatial demography.” [REDACTED] stated that he first met the petitioner “last fall when he applied for a tenure-tracked assistant professor position at our department,” but [REDACTED] did not state the outcome of that application. The letter contains no indication that the university offered the

petitioner the job, or even that position.

personally considered the petitioner to be qualified for the

Clearly, the witnesses believe the petitioner to be an above-average social scientist in his specialty, or to have the potential to become one in the future. We stress, here, that exceptional ability (defined at 8 C.F.R. § 204.5(k)(2) as “a degree of expertise significantly above that ordinarily encountered” in a given area of endeavor) does not automatically qualify a given alien for the national interest waiver. The plain wording of section 203(b)(2) of the Act indicates that aliens of exceptional ability are typically subject to the job offer/labor certification requirement. Therefore, to establish eligibility for the waiver, it cannot suffice for the petitioner to show that his skills are somewhat superior to those of others in an inherently beneficial field.

The petitioner documented various professional activities, asserting that these activities establish his eligibility for the waiver. For example, the petitioner submitted copies of requests for copies of his articles. The petitioner did not establish how the number of requests that he receives compares with the number of requests received by others in the field, nor did he indicate how many of those requests ultimately resulted in citation of his work. Evidence of professional interaction with others in the field is not *prima facie* evidence of eligibility for the waiver, unless the petitioner is able to show that such interaction is rare within the field.

On December 18, 2007, the director instructed the petitioner to “submit documentary evidence of the exact influence the petitioner’s work has had on this specialty or on the field in general,” including “copies of citation indices, showing numbers of citations” of the petitioner’s work. In response, the petitioner submitted additional witness letters, documentation of citations, and information about the progression of the petitioner’s career, including a January 18, 2008 letter offering the beneficiary a tenure-track assistant professorship at MSU.

The assistant professorship is not evidence of eligibility for the waiver, because there exists no blanket waiver for tenure-track university faculty. Even if such a blanket waiver existed, the offer was not made until well after the petition’s July 2007 filing date. The petitioner must have been eligible for the benefit sought at the time of filing; he cannot rely on subsequent developments. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). In any event, a tenure-track job offer is not, as counsel asserts, recognition of “Petitioner’s Outstanding Abilities” (counsel’s capitalization).

The petitioner also submitted copies of messages relating to his attempts to secure positions at other institutions, such as the University of Virginia and Oak Ridge National Laboratory. The record does not show that any of these inquiries actually led to formal job offers, and even if they did, that would show only that the institutions consider the petitioner to be qualified for employment. The significance of this evidence is, therefore, far from clear.

There seems to be a pattern of exaggeration of the importance of the petitioner’s evidence. For example, counsel stresses the petitioner’s participation in peer review of manuscripts, but the petitioner has submitted nothing to show that invitation to perform peer reviews is, itself, a sign of special

recognition or esteem in the academic community, rather than a responsibility that is expected of qualified researchers who, themselves, seek to publish their own work in peer-reviewed journals.

Turning to the petition's second group of witness letters, [REDACTED] stated that his department "made the [job] offer to [the petitioner] for his excellence in research," including the petitioner's "publication record," presentations at "prestigious conferences," and "several important awards." The letter explains why [REDACTED] considered the petitioner to be the best-qualified candidate for the assistant professorship, but it sheds little further light on why the petitioner should received the additional benefit of a national interest waiver.

[REDACTED] of the University of Minnesota "discovered and cited two of [the petitioner's] excellent coauthored papers" when he "conducted a review of the literature" in 2006. Dr. [REDACTED] stated that the petitioner's "findings challenged the efficiency of current planning and decision making mechanism, and suggested a more effective approach to planning and decision-making practice." [REDACTED] did not indicate to what extent the petitioner's "more effective approach" has been implemented on a national scale, or what results have arisen from more limited application of that approach.

[REDACTED] of Florida State University discussed the petitioner's receipt of an award for one of his papers. The petitioner received this award in October 2007, several months after the petition's filing date, and therefore *Katigbak* prevents its consideration here. Even if the petitioner had received the award prior to the filing date, a claim of exceptional ability can rest, in part, on evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations. Such recognition cannot suffice, by itself, to establish exceptional ability. See 8 C.F.R. § 204.5(k)(3)(ii)(F). As we have already stated, an alien of exceptional ability typically must have a qualifying job offer for the classification sought. The national interest waiver is an additional factor, over and above the underlying classification, and therefore evidence that tends to support a claim of exceptional ability is not interchangeable with evidence that meets the higher threshold of the national interest waiver.

former Director of the Technical Services Department of the San Diego Association of Governments, stated:

I started to know [the petitioner's] work at the 2004 annual meeting of the Population Association of America. I was the Discussant for "Highways and Population Change," a paper that [the petitioner] co-authored with [REDACTED]. . . . Their research encouraged decision makers and planners to rethink about the role of road construction. . . . More recently, [the petitioner] submitted a single-authored paper to the journal of *Demography*, and I am one of the reviewers. . . . In the paper, [the petitioner] has made tremendous contributions to the field of small-area population and transportation forecasting.

Notwithstanding the assertions about the article's importance, the record contains no evidence that *Demography* accepted the petitioner's article for publication.

[REDACTED] Research Leader of the Geographic Information Science and Technology Group at Oak Ridge National Laboratory, praised the petitioner's "groundbreaking interdisciplinary spatio-temporal regression approach for small-area population forecasting." The record does not document the extent to which demographers have actually applied the petitioner's regression approach. [REDACTED] attested to attempting to recruit the petitioner for employment, but the record shows only that, in late 2007, [REDACTED] and the petitioner discussed a possible visit in February or March 2008.

The petitioner submitted copies of two articles that contain citations to the petitioner's work. The author of one article is [REDACTED], an assistant professor at the University of Wisconsin-Madison who, the record shows, has (like the petitioner) collaborated with [REDACTED] who in turn co-wrote the cited paper. The author of the other citing article is [REDACTED], whose letter we have already discussed. These two citations do not demonstrate that the petitioner's published work, previously touted as groundbreaking, has significantly influenced the work of others in the field. If other citations exist, the petitioner's omission of those items from the record has precluded their consideration here.

The petitioner submitted information regarding the impact factors of journals that have published his work. The impact factor is an average, compiled from citation data relating to all the articles that have appeared in a given journal. Publication in a high-impact journal does not imply or cause high impact for any one given article in that journal. Indeed, the petitioner's submission of materials relating to journal impact factors demonstrates that the petitioner is conscious of the importance of citations when judging a publication's impact. Nevertheless, the petitioner documented only two citations of his work, one of which was from an associate of his former mentor, [REDACTED].

The director denied the petition on April 23, 2008. The director acknowledged the petitioner's submission of published articles, witness letters, and other exhibits, but found that the record lacks documentary evidence to support the claims put forth in the letters. The director added that the petitioner had not demonstrated significant independent citation of the petitioner's articles.

On appeal, the petitioner asserts that the director "relied solely on the number of citations to evaluate the impact of the alien's achievements without discerning the academic areas." In a later supplement to the appeal, the petitioner submits documentation indicating that demographic journals do not have citation rates as high as those of journals in many other disciplines.

The AAO acknowledges the assertion that citation rates are low in the petitioner's field, but the director did not base the denial "solely on the number of citations" as the petitioner argues on appeal. The director mentioned citations in the decision, but also found more broadly that "the documentary evidence does not support the opinions expressed in the letters." Documentary evidence of the petitioner's impact can take forms beyond citations of journal articles. For example, witnesses have described the petitioner's research relating to the effects of highway construction. The petitioner has

not documented that highway planners over a wide geographic range have taken the petitioner's work into account in their subsequent projects.

Furthermore, even taking into account the asserted low overall citation rate in the petitioner's field of endeavor, the petitioner has not shown that the overall citation rate of his work significantly exceeds the average in that field (as shown by the impact factors of journals specializing in that field).

Counsel states that, in discussing the citation of the petitioner's work, the director failed to take several citations into account. On appeal, the petitioner submits documentation of four published citations of his work (including the two discussed previously), all published before the director issued the request for evidence on December 18, 2007. Three unpublished manuscripts written or co-written by students also contain citations of the petitioner's work. The petitioner did not produce these materials in response to the director's earlier specific request for "copies of *all* published works of authors who cite the petitioner's work, or other evidence, such as copies of citation indices, showing numbers of citations" (emphasis added). Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533, 537 (BIA 1988). Counsel protests that the citation figures provided by counsel are "not true," but if this is so, it is only because the petitioner failed to provide requested evidence. We cannot fault the director for failing to consider evidence that the petitioner did not submit.

Counsel discusses other materials in the record, such as evidence of awards that the petitioner has received. As we have already discussed, these materials may support a claim of exceptional ability, but exceptional ability does not automatically qualify an alien for the separate, additional benefit of exemption from the job offer requirement.

Also already discussed was the tendency to exaggerate the significance of materials in the record. The record indicates that the petitioner's career is still at something of an embryonic state, and at best the petition was filed prematurely. Thus, we have a situation in which the petitioner boasts of having submitted an article for publication in *Demography*, but he does not show that the journal actually accepted the article. By the same token, the petitioner provides documentation about several prestigious research institutions, but he is able only to show that he scheduled job interviews there.

Counsel argues that the labor certification process is inappropriate for the petitioner's situation because "[t]he labor certification procedure was designed to locate workers who can meet the minimum qualifications for a position and perform the duties of that position at a basic level of competency." Counsel fails to consider that 20 C.F.R. § 656.18 establishes a separate procedure for college and university teachers. In such cases, the institution need not show that no minimally qualified U.S. worker is available. Rather, the intending employer must be able to document the alien was selected for the job opportunity in a competitive recruitment and selection process through which the alien was found to be more qualified than any of the United States workers who applied for the job. 20 C.F.R.

§ 656.18(b). The petitioner has not explained why this procedure would not apply to his tenure-track assistant professorship at MSU, which includes substantial teaching duties.

As for counsel's assertion that labor certification is inapplicable because the petitioner has essentially created a new or greatly changed version of his discipline, this is essentially a distillation of several witness letters. Given the nature of the claims put forth in those letters, it is reasonable to expect some kind of objective evidence to exist that would support those claims. The AAO concurs with the director that the record lacks such evidence.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.